

Honorable James L. Robart

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

v.

CITY OF RENTON  
Renton City Hall  
1055 S. Grady Way  
Renton, WA 98057

and

CITY OF VANCOUVER  
210 East 13<sup>th</sup> Street  
Vancouver, WA 98668

Defendants.

Civil Action

No. 2:11-CV-01156 JLR

DEFENDANTS' MOTION FOR  
PARTIAL SUMMARY JUDGMENT

**NOTE ON MOTION CALENDAR:**

**March 2, 2012**

ORAL ARGUMENT REQUESTED

**I. RELIEF REQUESTED**

COMES NOW defendants, City of Renton, and City of Vancouver, and move the court for an order of partial summary judgment pursuant to Fed. R. Civ. P. 56 on the grounds that no material issue of fact exists as to the effect of the Stormwater Amendment, S. 3841, U.S.C. § 1323(c), subtitled "An Act to amend the Federal Water Pollution Control Act to clarify Federal responsibility for stormwater pollution" and its effect upon the Clean Water Act's waiver of sovereign immunity. The Stormwater Amendment clarifies that the United States of America

Defendants' Motion for Partial Summary Judgment - 1  
(No. 2:11-cv-01156 JLR)

TED H. GATHE  
CITY ATTORNEY  
415 W. 6<sup>th</sup> STREET  
VANCOUVER, WA 98668  
Tel: (360) 487-8500 \* Fax: (360) 487-8501

1 is responsible for paying local governmental entities for “reasonable service charges,” imposed  
2 in connection with stormwater management programs to reduce or prevent harmful  
3 contaminants and pollution from entering the streams, rivers, lakes and waterways of the  
4 United States.

5 Defendants respectfully request this Court to enter an order of partial summary  
6 judgment that (1) Congress through the Clean Water Act expressly waived sovereign immunity  
7 prior to January 4, 2011, to permit local governmental entities to impose “reasonable service  
8 charges” against the United States in conjunction with stormwater management programs; (2)  
9 that the Stormwater Amendment clarified the intent of Congress’s waiver of sovereign  
10 immunity in the Clean Water Act to make the federal government and its departments and  
11 agencies responsible for paying its fair share of costs incurred by local governments to meet the  
12 requirements of the Clean Water Act; and (3) the Stormwater Amendment’s clarifying effect  
13 upon the Clean Water Act confirmed Congress’s intent to waive sovereign immunity for  
14 “reasonable service charges” imposed by defendants against plaintiff prior to January 4, 2011.

15 This matter is appropriate for summary judgment as each issue addresses statutory  
16 construction and legislative intent.

## 17 **II. STATEMENT OF FACTS**

18 The Bonneville Power Administration (BPA), an agency of plaintiff, administers  
19 properties owned by the United States in Renton and Vancouver. Plaintiff’s properties are  
20 served by defendants’ respective municipal separate storm sewer systems. BPA paid the City  
21 of Vancouver for its stormwater fees from January 1, 1995 through January 2010. (*See*,  
22 Affidavit of Brian Carlson, ¶ 5.) Likewise, BPA paid the City of Renton its stormwater fees

1 until July 30, 2009. (*See*, Affidavit of Gregg Zimmerman, ¶ 4.) BPA ceased payments of its  
2 stormwater fees to defendants claiming sovereign immunity. (*See*, Affidavit of Gregg  
3 Zimmerman, ¶ 4, and Affidavit of Brian Carlson, ¶ 6.) Following enactment of the Stormwater  
4 Amendment on January 4, 2011, BPA recommenced payments of stormwater fees to both  
5 Renton and Vancouver. (*See*, Affidavit of Brian Carlson, ¶ 7 and Affidavit of Gregg  
6 Zimmerman, ¶ 4.) Plaintiff continues to claim sovereign immunity for defendants' stormwater  
7 fees imposed prior to January 4, 2011. (*See*, Complaint for Declaratory Relief and Refund,  
8 Case No. 2:11-cv-01156 JLR, Document 1, paragraphs 1 and 24, pp. 1 and 4, filed 7/12/2011.)  
9

10 The City of Renton and the City of Vancouver have respectively operated municipal  
11 separate storm sewer systems since 1987 and 1995. Renton's and Vancouver's systems are to  
12 comply with National Pollution Discharge Elimination System (NPDES) requirements. The  
13 Washington State Department of Ecology, in accordance with regulations of and pursuant to  
14 authority delegated by the United States Environmental Protection Agency (EPA) as required  
15 by the Clean Water Act, 33 U.S.C. §1342(p)(3)(B), regulated the defendants' compliance with  
16 NPDES. Both Renton and Vancouver have received NPDES permits for their municipal  
17 separate storm sewer systems. (*See*, Affidavit of Gregg Zimmerman, ¶ 2 and 3 and Affidavit of  
18 Brian Carlson, ¶ 3.)  
19

20 The United States has admitted that defendants' systems are regulated by NPDES  
21 permits issued by the Washington State Department of Ecology. (*See*, paragraphs 51 and 55,  
22 pp. 3-4, United States of America's Answer to Counterclaim by City of Renton and paragraphs  
23 51 and 55, pp. 3-4, United States of America's Answer to Counterclaim by City of Vancouver,  
24 Case 2:11-cv-01156 JLR, Documents 13 and 14, filed 10/24/11.)  
25

1 The rates charged by Renton and Vancouver are based upon square footage of  
2 impervious surface. Defendants' rates are uniform for each class of users. (*See*, Affidavit of  
3 Gregg Zimmerman, ¶ 4 and Affidavit of Brian Carlson, ¶ 3.) The United States has admitted  
4 that Renton's and Vancouver's stormwater fees are imposed to provide and maintain their  
5 separate stormwater systems. (*See*, paragraph 56, p. 4, United States of America's Answer to  
6 Counterclaim by City of Renton and paragraph 56, p. 4, United States of America's Answer to  
7 Counterclaim by City of Vancouver, Case 2:11-cv-01156 JLR, Documents 13 and 14, filed  
8 10/24/11, page 4).

### 10 III. STATEMENT OF ISSUES

11  
12 1. Did Congress through the Clean Water Act waive the sovereign immunity of  
13 the United States of America to subject federal departments and agencies to  
14 payment of "reasonable service charges" imposed by local governments for the  
15 control and abatement of water pollution?

16 2. In the Stormwater Amendment, did Congress intend to clarify its waiver of  
17 sovereign immunity in the Clean Water Act that made federal departments and  
18 agencies responsible for payment of "reasonable service charges?"

19 3. Based upon the waiver of sovereign immunity for "reasonable service charges"  
20 in the Clean Water Act and the subsequent clarification provided by Congress in  
21 the Stormwater Amendment, is plaintiff responsible for payment of defendants'  
22 stormwater management fees imposed prior to January 4, 2011?

23 //

24 //

25 //

//

//

//

#### IV. EVIDENCE RELIED UPON

1. Affidavit of Gregg Zimmerman in Support of Defendants' Motion for Partial Summary Judgment;
2. Affidavit of Brian Carlson in Support of Defendants' Motion for Partial Summary Judgment; and
3. The records and files herein.

#### IV. ARGUMENT AND AUTHORITIES

**1. Did Congress through the Clean Water Act waive the sovereign immunity of the United States to subject federal departments and agencies to payment of "reasonable service charges" imposed by local governments for the control and abatement of water pollution?**

"Waivers of federal sovereign immunity must be 'unequivocally expressed' in the statutory text." *United States v. Idaho*, 508 U.S. 1, 6 (1993). In *United States v. Idaho*, the Court also cautioned that just as courts should not "extend the waiver beyond that which Congress intended" courts should not "assume the authority to narrow the waiver that Congress intended." 508 U.S. at 7.

In this action, it is for this Court to determine as a matter of law whether Congress waived the sovereign immunity of the United States in the Clean Water Act, so that "reasonable service charges" imposed by local governments for the control and abatement of water pollution must be paid by plaintiff and its departments and agencies.

Only when Congress affirmatively declares that the federal government's instrumentalities or property are subject to state regulation, and such declaration is made in a manner which is clear and unambiguous, then the federal government will be subject to such regulation and related charges. *Hancock v. Train*, 426 U.S. 167, 178-179 (1976) (Legislatively

1 superseded by the 1977 amendment to the Clean Water Act). In this case, the Clean Water Act  
2 of 1977 clearly and unambiguously waived sovereign immunity for “reasonable service  
3 charges,” stating in paragraph (a):

4     § 313. Each department, agency, or instrumentality of the executive, legislative, and  
5 judicial branches of the Federal Government (1) having jurisdiction over any property  
6 or facility, or (2) engaged in any activity resulting, or which may result, in the  
7 discharge or runoff of pollutants, and each officer, agent, or employee thereof in the  
8 performance of his official duties, shall be subject to, and comply with, all Federal,  
9 State, interstate, and local requirements, administrative authority, and process and  
10 sanctions respecting the control and abatement of water pollution in the same manner,  
11 and to the same extent as any nongovernmental entity including the payment of  
12 reasonable service charges. The preceding sentence shall apply (A) to any  
13 requirement whether substantive or procedural (including any recordkeeping or  
reporting requirement, any requirement respecting permits and any other requirement,  
whatsoever), (B) to the exercise of any Federal, State, or local administrative  
authority, and (C) to any process and sanction, whether enforced in Federal, State, or  
local courts or in any other manner. This subsection shall apply notwithstanding any  
immunity of such agencies, officers, agents, or employees under any law or rule of  
law.

14 amended P.L. 95-217, §§ 60, 61(a), 91 Stat. 1597, 1598, 33 U.S.C. § 1323(a) (emphasis added).

15 The waiver of sovereign immunity in the Clean Water Act requires the federal government to  
16 pay defendants’ stormwater charges like any private entity.

17         Congress amended the Clean Water Act and the Clean Air Act in response to the  
18 decisions of the United States Supreme Court in *Hancock v. Train*, 426 U.S. 167 (1976), and  
19 *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200 (1976). In response to the  
20 United States Supreme Court decisions in *Hancock* and *EPA*, Congress stated that:  
21

22         The act has been amended to indicate unequivocally that all Federal facilities and  
23 activities are subject to all of the provisions of State and local pollution laws.  
24 Though this was the intent of the Congress in passing the 1972 Federal Water  
25 Pollution Control Act Amendments, the Supreme Court, encouraged by Federal  
agencies, has misconstrued the original intent. Since the substantive requirements  
of the act and of State and local law would be unenforceable unless procedural  
provisions were also met, Section 313 is amended to specify that, as in the case of

1 air pollution, a Federal facility is subject to any Federal, State, and local  
2 requirement respecting the control or abatement of water pollution, both  
3 substantive and procedural, to the same extent as any person is subject to these  
requirements. This includes, but is not limited to, requirements to obtain operating  
and construction permits ... and the payment of reasonable service charges.

4 S. Rep. No. 370, 95th Cong., 1st Sess. 67, *reprinted in* 1977 U.S. Code Cong. & Admin. News  
5 4326, 4392 (emphasis added).

6 Congress made an explicit, expansive waiver of sovereign immunity for reasonable  
7 service charges in 1977, which no court has deemed unclear or ambiguous for over three  
8 decades. In sum, Congress through the Clean Water Act waived the sovereign immunity of the  
9 United States, thus subjecting plaintiff's departments and agencies to payment of "reasonable  
10 service charges" imposed by local governments to meet the requirements of the Act.  
11

12  
13 **2. In the Stormwater Amendment, did Congress intend to**  
14 **clarify its waiver of sovereign immunity in the Clean Water**  
15 **Act that made federal departments and agencies responsible**  
16 **for payment of "reasonable service charges?"**

17 As a result of some federal agencies disputing their responsibility to pay reasonable  
18 service charges for stormwater management fees, Congress passed the Stormwater  
19 Amendment, S. 3841, "*An Act to amend the Federal Water Pollution Control Act to clarify*  
20 *Federal responsibility for stormwater pollution.*" See, 33 U.S.C. § 1323(c). The Stormwater  
21 Amendment was signed by President Barack Obama on January 4, 2011.

22 This Act amended § 313 of the Federal Water Pollution Control Act (33 U.S.C. 1323)  
23 by adding subsection (c):

24 **Section 1. Federal Responsibility To Pay For Stormwater Programs.**

25 Section 313 of the Federal Water Pollution Control Act (33 U.S.C. 1323) is  
amended by adding at the end the following:

1 (c) REASONABLE SERVICE CHARGES.—

2 (1) IN GENERAL.—For the purposes of this Act, reasonable service charges  
3 described in subsection (a) include any reasonable nondiscriminatory fee, charge,  
4 or assessment that is—

5 (A) based on some fair approximation of the proportionate contribution of  
6 the property or facility to stormwater pollution (in terms of quantities of  
7 pollutants, or volume or rate of stormwater discharge or runoff from the property  
8 or facility); and

9 (B) used to pay or reimburse the costs associated with any stormwater  
10 management program (whether associated with a separate storm sewer system or  
11 a sewer system that manages a combination of stormwater and sanitary waste),  
12 including the full range of programmatic and structural costs attributable to  
13 collecting stormwater, reducing pollutants in stormwater, and reducing the  
14 volume and rate of stormwater discharge, regardless of whether that reasonable  
15 fee, charge, or assessment is denominated a tax.

16 P.L. 111-378, § 1, 124 Stat. 4128. Consistent with its function as a clarification of existing  
17 law, the Stormwater Amendment contains no new waiver of sovereign immunity. The  
18 Stormwater Amendment simply references the existing statutory obligation to pay reasonable  
19 service charges under 33 U.S.C. 1323(a), and then codifies already existing case law defining  
20 “reasonable services charges” as the three prongs of the test stated in *Massachusetts v. United*  
21 *States*, 435 U.S. 444, 464 (1978): (1) “nondiscriminatory;” (2) “fair approximation;” and (3)  
22 “revenues to recoup costs.”

23 The legislative history of the Stormwater Amendment repeatedly refers to its function  
24 as a clarifying amendment. Its title states that it intends to “clarify” federal responsibility for  
25 reasonable service charges related to control of water pollution from stormwater. When  
26 Senator Ben Cardin introduced the bill in 2010, he stated:

27 I continue to have grave concerns about the failure of the Federal Government to  
28 pay localities for reasonable costs associated with the control and abatement of  
29 pollution that is originating on its properties.

30 \*\*\*



1 I believe that this administration recognizes its responsibility to manage the  
2 stormwater pollution that comes off Federal properties. But that responsibility  
3 needs to translate into payments to the local governments that are forced to deal  
4 with this pollution. That commitment needs to be more than an Executive Order.  
5 Adopting the legislation that I am introducing today will remove all ambiguity  
6 about the responsibility of the Federal Government to pay these normal and  
7 customary stormwater fees.

8 156 Cong. Rec. S4855-S4856 (daily ed. June 10, 2010) (emphasis added). After the Senate's  
9 passage of the Stormwater Amendment, Senator Cardin again explained the purpose of the  
10 amendment in similar terms:  
11

12 [T]oday the Congress stands ready to approve S. 3481, a bill to clarify Federal  
13 responsibility to pay for stormwater pollution. This legislation, which will soon  
14 become law, requires the Federal government to pay localities for reasonable  
15 costs associated with the control and abatement of pollution that is originating on  
16 its properties. At stake is a fundamental issue of equity: polluters should be  
17 financially responsible for the pollution that they cause. That includes the Federal  
18 Government.

19 156 Cong. Rec. S11,023 (daily ed. Dec. 22, 2010) (emphasis added).

20 Senator Cardin has asserted a consistent, public, and unambiguous articulation of the  
21 intended purpose and effect of the Stormwater Amendment: that Congress intended the  
22 Stormwater Amendment to clarify the obligation for payment of stormwater assessments by the  
23 federal Government. Because he is the sponsor of the bill, Senator Cardin's opinion must be  
24 given great weight. (*See, N.L.R.B. v. Fruit & Vegetable Packers, Local 760*, 377 U.S. 58, 66  
25 (1964) ("It is the sponsors that we look to when the meaning of the statutory words is in  
doubt.") and *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 238 (1989) (rely on stated  
understanding of "the principal sponsor of the Senate bill" in interpreting a statute).

26 The legislative history in the Congressional Record leaves no doubt about the intent of  
27 Senator Cardin, and ultimately, Congress, that "[t]his legislation [Stormwater

1 Amendment]...requires the Federal government to pay localities for reasonable costs associated  
2 with the control and abatement of pollution that is originating on [Federal] properties. At stake  
3 is a fundamental issue of equity: polluters should be financially responsible for the pollution  
4 that they cause. That includes the Federal Government.”

5  
6 **3. Based upon the waiver of sovereign immunity for**  
7 **“reasonable service charges” in the Clean Water Act and the**  
8 **subsequent clarification provided by Congress in the**  
9 **Stormwater Amendment, is plaintiff responsible for payment**  
10 **of defendants’ stormwater management fees imposed prior to**  
11 **January 4, 2011?**

12 Enactment of the Stormwater Amendment has legal implications beyond the effect of  
13 forcing the BPA to pay its current stormwater bills. Because it is an Act that “clarifies”  
14 existing law, it means that the plaintiff had a pre-existing obligation to pay its stormwater bills  
15 incurred before January 4, 2011, when the Stormwater Amendment was signed into law by  
16 President Obama.

17 The U.S. District Court for the Western District of Washington, has previously  
18 identified two factors in determining whether an amendment clarifies or whether it enacts  
19 substantive law: (1) whether statutory language is ambiguous and therefore in need of  
20 clarification, and (2) whether Congress declared its intent to clarify. *Fishing Co. v. United*  
21 *States*, 195 F. Supp. 2d 1239, 1255 (2002) (W.D. Wa.). The Stormwater Amendment is a  
22 clarification of existing law: (1) its sponsor’s intent was to “remove all ambiguity;” and (2)  
23 Congress declares its intent to clarify.

24 “The Ninth Circuit has consistently stated that when an amendment is a clarification,  
25 rather than an alteration of existing law, then it should be used in interpreting the provision in

1 question” as if it had always been so clarified. *United States v. Sanders*, 67 F.3d 855, 856 (9<sup>th</sup>  
2 Cir. 1995). An amendment that enacts new substantive law should not be applied retroactively,  
3 but already existing laws that are merely clarified in essence already existed and should be so  
4 applied. *Fishing Co. v. United States*, 195 F. Supp. 2d 1239, 1255 (2002) (W.D. Wa.); *Beverly*  
5 *Community Hosp. Ass'n v. Belshe*, 132 F.3d 1259, 1265 (9th Cir. 1997).

6  
7 The fact that the Stormwater Amendment is a clarification of existing law must be  
8 considered in light of the undisputed facts that defendants’ stormwater programs have been in  
9 place since 1987 and 1995 and that the BPA is currently paying its stormwater bills to Renton  
10 and Vancouver. The Clean Water Act of 1977 was already in existence, including the language  
11 waiving sovereign immunity. The Stormwater Amendment merely clarified what already  
12 existed, and therefore it should be so applied to clarify the waiver of sovereign immunity in the  
13 Clean Water Act.

14  
15 The Court should rule as a matter of law that the Stormwater Amendment clarified  
16 existing law. As a result, plaintiff is required to pay its stormwater fees incurred before January  
17 4, 2011 to each defendant.

#### 18 IV. CONCLUSION

19 Defendants respectfully request that this Court grant partial summary judgment that (1)  
20 the Clean Water Act waived the sovereign immunity of the United States of America to subject  
21 federal departments and agencies to payment of “reasonable service charges” imposed by local  
22 governments for the control and abatement of water pollution; (2) that the Stormwater  
23 Amendment clarified the waiver of sovereign immunity in the Clean Water Act that made  
24 federal departments and agencies responsible for payment of “reasonable service charges,” and  
25

1 (3) based upon the waiver of sovereign immunity for “reasonable service charges” in the Clean  
2 Water Act and the subsequent clarification provided by Congress in the Stormwater  
3 Amendment, the plaintiff is responsible for payment of defendants’ stormwater management  
4 fees imposed prior to January 4, 2011.

5           RESPECTFULLY SUBMITTED this 7th day of February, 2012.

6                                   TED H. GATHE  
7                                   Vancouver City Attorney

8                                   By: /s/ Linda A. Marousek  
9                                   LINDA A. MAROUSEK, WSBA No. 12045  
10                                  Assistant City Attorney  
11                                  415 W. 6<sup>th</sup> Street  
12                                  Vancouver, WA 98668-1995  
13                                  Telephone: (360) 487-8500  
14                                  Facsimile: (360) 487-8501  
15                                  E-mail: [linda.marousek@cityofvancouver.us](mailto:linda.marousek@cityofvancouver.us)  
16                                  Attorney for the City of Vancouver

17                                  LAWRENCE J. WARREN  
18                                  Renton City Attorney

19                                  By: /s/ Mark Barber  
20                                  /s/ Garmon Newsom II  
21                                  By: MARK BARBER, WSBA No. 8379  
22                                  Senior Assistant City Attorney  
23                                  GARMON NEWSOM II, WSBA No. 31418  
24                                  Assistant City Attorney  
25                                  City of Renton  
                                  100 S. 2<sup>nd</sup> St.  
                                  P.O. Box 626  
                                  Renton, WA 98057-0626  
                                  Telephone: (425) 430-6485  
                                  Facsimile: (425) 430-6498  
                                  E-mail: [mbarber@rentonwa.gov](mailto:mbarber@rentonwa.gov)  
                                  E-mail: [gnewsom@rentonwa.gov](mailto:gnewsom@rentonwa.gov)  
                                  Attorneys for the City of Renton

**CERTIFICATE OF SERVICE**

I hereby certify that on the date provided below, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following individual(s):

DATED this 7<sup>th</sup> day of February, 2012.

For the United States:

Jenny A. Durkin  
United States Attorney

John A. Diccico  
Principal Deputy Assistant  
Attorney General  
Tax Division

Jonathan D. Carroll  
Trial Attorney, Tax Division  
U.S. Department of Justice  
Post Office Box 227  
Washington, D.C. 20044  
Email: [Jonathan.D.Carroll@usdoj.gov](mailto:Jonathan.D.Carroll@usdoj.gov)

Brian C. Kipnis  
Assistant United States Attorney  
5220 United States Courthouse  
700 Stewart Street  
Seattle, WA 98101  
Email: [Brian.Kipnis@usdoj.gov](mailto:Brian.Kipnis@usdoj.gov)

Jonathan D. Carroll  
Joseph E. Hunsader  
Trial Attorney, Tax Division  
U.S. Department of Justice  
Post Office Box 227  
Ben Franklin Station  
Washington, D.C. 20044  
Tel: (202) 307-6669 (202)  
Fax: (202) 514-6866  
Email: [Jonathan.D.Carroll@usdoj.gov](mailto:Jonathan.D.Carroll@usdoj.gov)  
Email: Joseph E. [Hunsader@usdoj.gov](mailto:Hunsader@usdoj.gov)

For the City of Vancouver:

Linda A. Marousek  
Assistant City Attorney  
City of Vancouver  
415 West 6<sup>th</sup> Street  
Vancouver, WA 98660  
Tel: (360) 487-8500  
Fax: (360) 487-8501  
Email: [Linda.marousek@cityofvancouver.us](mailto:Linda.marousek@cityofvancouver.us)

For the City of Renton:

By: /s/ Mark Barber  
By: MARK BARBER, WSBA No. 8379  
Senior Assistant City Attorney  
GARMON NEWSOM II, WSBA No. 31418  
Assistant City Attorney  
City of Renton  
100 S. 2<sup>nd</sup> St./ P.O. Box 626  
Renton, WA 98057-0626  
Tel. (425) 430-6485  
Fax: (425) 430-6498  
E-mail: [mbarber@rentonwa.gov](mailto:mbarber@rentonwa.gov)  
E-mail: [gnewsom@rentonwa.gov](mailto:gnewsom@rentonwa.gov)  
Attorneys for the City of Renton